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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
VS.
MARK ALAN RADKE,
Respondent.

On Petition for Writ of Certiorari
To the California Court of Appeal
Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a police officer detains a motorist on suspicion of murder, does the Fourth Amendment permit the officer to draw his revolver and order the motorist to get out of his car?

2. When in the course of an otherwise valid detention a police officer observes evidence on the hands of the suspect which gives the officer probable cause to arrest him, does the Fourth Amendment make the observation and the arrest unlawful if the observation was made while the officer was impermissibly handcuffing the suspect?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTIONAL GROUNDS	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. SUMMARY OF MATERIAL FACTS	3
B. PROCEDURAL HISTORY	6
C. HOW THE FEDERAL QUESTION WAS PRESENTED	8
REASONS FOR GRANTING REVIEW	8
ARGUMENT	11
THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO DRAW HIS WEAPON AND ORDER A MOTORIST SUSPECTED OF MURDER TO GET OUT OF HIS CAR. THE FOURTH AMENDMENT DOES NOT REQUIRE NOR PERMIT SUPPRESSION OF THE OFFICER'S OBSERVATION OF THE SUSPECT'S EXTERNAL PHYSICAL CHARACTERISTICS DURING THE ENSUING DETENTION, EVEN IF THE OBSERVATION WAS MADE WHILE THE OFFICER WAS IMPERMISSIBLY HANDCUFFING THE SUSPECT	11
CONCLUSION	18

APPENDICES

A. Opinion and Judgment of the California Court of Appeal, Fourth Appellate District, Division One, July 29, 1988	A-1

TABLE OF CONTENTS

	Page
B. Order of the Superior Court, in and for San Diego County, May 31, 1988	B-1
C. Order of the California Court of Appeal, Fourth Appellate District, Division One, August 18, 1988	C-1
D. Order of the California Supreme Court, October 13, 1988	D-1
E. Order of the California Court of Appeal, Fourth Appellate District, Division One, November 3, 1988	E-1

TABLE OF AUTHORITIES

Cases

	Page
Adams v. Williams (1972) 407 U.S. 143 [32 L.Ed.2d 612]	13
Florida v. Royer (1983) 460 U.S. 491 [75 L.Ed.2d 229]	14
In re *Lance W.* (1985) 37 Cal.3d 873 [694 P.2d 744]	8
Katz v. United States (1967) 389 U.S. 347 [19 L.Ed.2d 576]	9, 10
Michigan v. Long (1983) 463 U.S. 1032 [77 L.Ed.2d 1201]	14
New York v. Quarles (1984) 467 U.S. 649 [81 L.Ed.2d 550]	3
Pennsylvania v. Bruder (1988) ____ U.S. ____ (No. 88-161 Decided October 31, 1988)	10
Pennsylvania v. Mimms (1977) 434 U.S. 106 [54 L.Ed.2d 331]	11
Terry v. Ohio (1968) 392 U.S. 1 [20 L.Ed.2d 889]	13
United States v. Dionisio (1973) 410 U.S. 1 [35 L.Ed.2d 67]	9, 10, 15
United States v. Hensley (1985) 469 U.S. 221 [83 L.Ed.2d 604]	8, 12
United States v. Jackson (2d Cir. 1981) 652 F.2d 244	13
United States v. Knotts (1983) 460 U.S. 276 [75 L.Ed.2d 55]	9, 10
United States v. Payner (1980) 447 U.S. 727 [65 L.Ed.2d 468]	16

TABLE OF AUTHORITIES

CASES

Page

United States v. Sharpe (1985) 470 U.S. 675 [84 L.Ed.2d 605] 14, 15

Wong Sun v. United States (1963) 371 U.S. 471 [9 L.Ed.2d 441] 17

Constitutions

California Constitution, Article I, section 28(d) .. 8

United States Constitution,

Amendment IV ..... *passim*

Amendment XIV 3

Statutes

California Penal Code, Section 1538.5 ..... 2, 7

62 Statutes at Large, p. 929 (28 U.S.C. § 1257(3)) Act of June 25, 1948, chapter 646 3

Rules

Rules of the Supreme Court of the United States, Rule 17.1(c) 8

Textbooks

3 W. LaFave, *Search and Seizure,* section 9.2 .... 10, 14

Articles

Maguire, How to Unpoison the Fruit — The Fourth Amendment and the Exclusionary Rule, 55 J.Crim.L.C. and P.S. 307 (1964) 18

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, filed on July 29, 1988, in case number D008276, which vacated the order of the Superior Court, in and for San Diego County, which had denied the defendant's motion to exclude evidence on the basis of an alleged Fourth Amendment violation. The People's petition for review by the California Supreme Court was denied on October 13, 1988.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal in case number D008276 appears as Appendix A

herein. The order of the California Supreme Court denying the People's petition for review appears as Appendix D herein. Other orders relating to this matter appear as Appendices B, C, and E herein. All of the relevant orders are further described in the next section, Jurisdictional Grounds.

JURISDICTIONAL GROUNDS

An order of the Superior Court, in and for San Diego County, filed on May 31, 1988, denied defendant Mark Alan Radke's motion to suppress evidence on Fourth Amendment grounds pursuant to California Penal Code section 1538.5. A copy of that order is Appendix B herein.

On defendant Radke's petition for writ of mandate, the California Court of Appeal, Fourth Appellate District, Division One, in an opinion filed on July 29, 1988, in case Number D008276, vacated the aforesaid order of the Superior Court and ordered the suppression of certain evidence. Petitioner seeks review of that opinion and judgment, a copy of which is Appendix A herein.

On August 18, 1988, the Court of Appeal denied the People's timely petition for rehearing. A copy of the order is Appendix C herein.

On October 13, 1988, the California Supreme Court denied the People's timely petition for review. A copy of the order is Appendix D herein.

On November 3, 1988, on the People's motion to stay the issuance of the remittitur until the United States Supreme Court made a final disposition on the People's petition for writ of certiorari, the California Court of Appeal ordered the remittitur stayed for 30 days. A copy of the order is Appendix E herein.

This petition is filed within 60 days after the denial on October 13, 1988, of the People's petition for review by the California Supreme Court, and is therefore timely.

This Court's jurisdiction to review the judgment in question by writ of certiorari is conferred by the Act of June 25, 1948, chapter 646, 62 Statutes 929 (28 U.S.C. § 1257(3)).

The decision of the California Court of Appeal is a "final judgment" within the meaning of 28 U.S.C. section 1257(3) because if respondent is convicted at trial petitioner's claim will be rendered moot, and if respondent is acquitted petitioner will be unable to press its claim on appeal (see *New York v. Quarles* (1984) 467 U.S. 649, 651, n. 1 [81 L.Ed.2d 550]).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provision of the United States Constitution, Fourth Amendment: "The right of the people to be secure in their persons, ... against unreasonable searches and seizures, shall not be violated ...." This provision is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

A. SUMMARY OF MATERIAL FACTS

Sixteen-year-old Jeffrey Rudiger left work early on the evening of January 21, 1988. (R.T. pp. 179-180, 192-193.)[1]

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[1]"R.T." refers to the Reporter's Transcript of the preliminary examination which was used as the evidentiary basis of the Superior Court's ruling which denied the defendant's motion to suppress evidence on Fourth Amendment grounds.

Before leaving work he told his friend and co-worker, Justin Valdivia, that he was going to meet with Mark Radke that evening. (R.T. pp. 120-127.)

Rudiger's body, badly beaten, slashed, and only partially clothed, was found in an alley the next morning. (R.T. p. 6-7, 180-181.) Two blood-covered knives were found about 20 feet from the body. (R.T. pp. 101-102, 108.)

San Diego Police Department homicide detectives examined the crime scene and photographed tire tracks which ran through pools of blood next to the victim's body. (R.T. pp. 7, 20, 91-92.). On the same day, January 22, they learned that Valdivia told a fellow officer, Carnahan, of Rudiger's plan to meet with Radke on the night of the murder. (R.T. p. 8.)

On the evening of January 22, the detectives located Radke's car in a public parking lot. They examined its tire treads and concluded they matched the bloody tire tracks at the crime scene. (R.T. pp. 9, 20, 47-49.)

Later that evening two of the detectives, Sgt. James Manis and Jerry Wiggins, saw Radke exit a house, enter his car, and drive away. The detectives followed him to an intersection where he stopped behind some other cars at a red light. (R.T. pp. 12, 64.)

The detectives got out of their car and approached him. Sgt. Manis did not draw his pistol. Wiggins drew his pistol but did not point it at Radke. (R.T. pp. 12-13, 26, 64.) There was no evidence that Radke ever saw Wiggins' drawn weapon. Manis displayed his badge, identified himself, and asked Radke to turn off his engine and step out of his car. Manis explained they wanted to talk to him about the death of Jeffrey Rudiger. (R.T. pp. 12-13.)

As Sgt. Manis and Radke walked back to the passenger side of the detectives' car, Radke asked whether he was under arrest. Manis replied, "No. We just want to interview you and talk to you about the death of Jeff Rudiger." Radke said, "Okay." (R.T. p. 13.)

Sgt. Manis told Radke that he was putting him in the rear seat and, because it was not a "cage" car, Manis was required to put handcuffs on him. Manis also told him that if Radke agreed not to do anything stupid, Manis would cuff his hands in front so he would be more comfortable. Radke agreed, and that procedure was followed. (R.T. p. 13.) Manis told Detective Wiggins to move Radke's car out of the traffic lanes. (R.T. pp. 13-14.)

During the handcuffing Sgt. Manis noticed the knuckles on both of Radke's hands were swollen, one hand had several scratches, and there was a laceration on the palm. It appeared to Manis that Radke had been in a fight. (R.T. p. 14.)

A few minutes later patrol officers arrived. Sgt. Manis directed them to take Radke to the police station and to impound Radke's car. (R.T. pp. 13-14, 26.)

During custodial interrogation at the police station Radke admitted he was the only driver of his car on the night of the murder. During the interrogation the police seized his jacket because it bore apparent bloodstains on the sleeves. They also obtained his consent to search his car, and they took a sample of his blood. (R.T. pp. 15, 50-55.)

Examination of the car revealed it bore blood of the victim's type, not the suspect's, under the wheel wells and on the floormat and on a cardboard dashboard protector. Radke's jacket also had diffused traces of the victim's type of blood. (R.T. pp. 135-141.) A criminalist's compari-

son of Radke's tire treads with the bloody tire tracks showed Radke's tires were consistent with the tracks. (R.T. pp. 86-87, 155-165.)

B. PROCEDURAL HISTORY

On February 5, 1988, a felony complaint was filed in the Municipal Court, San Diego Judicial District, accusing Mark Alan Radke of the murder of Jeffrey Vance Rudiger on January 21, 1988. The defendant was arraigned on the complaint on the same day and pleaded not guilty.

On April 5, 1988, a magistrate conducted a preliminary hearing on the complaint. During the course of the hearing the defendant, by his counsel, moved to suppress evidence offered against him on the ground it was obtained by an unlawful arrest of the defendant in violation of the Fourth Amendment of the United States Constitution. The magistrate denied the motion and held the defendant to answer the charge of murder in the Superior Court.

On April 19, 1988, an information was filed in the Superior Court, in and for San Diego County, accusing the defendant of the same murder. The defendant was arraigned on the information on the same day and pleaded not guilty. Trial was thereupon set for August 15, 1988. The defendant was subsequently released upon the posting of a bail bond in the amount of $300,000.

On May 10, 1988, the defendant filed a renewed motion in Superior Court to suppress the evidence on Fourth Amendment grounds. On May 24, 1988, the People filed a brief in opposition to the motion.

On May 31, 1988, a pretrial hearing was held on the motion in the Superior Court, the Honorable J. Perry Langford presiding. Pursuant to the provisions of Cali-

fornia Penal Code Section 1538.5(i), the transcript of the preliminary hearing was used as the evidentiary basis of the motion. The motion was denied.

On June 23, 1988, the defendant filed a petition for writ of mandate in the California Court of Appeal. The People filed an answer to the petition on July 5, 1988. A divided Court of Appeal granted the writ on July 29, 1988, with Todd, J., expressing his opinion the police conduct was reasonable and the petition should be denied.

On August 5, 1988, on defendant's motion and by stipulation of the parties, the Superior Court vacated the trial date of August 15, and ordered the trial to be stayed until receipt of a remittitur from the Court of Appeal. That stay continues in effect, and there is no scheduled trial date at this time.

On August 15, 1988, the People filed a petition for rehearing in the Court of Appeal. On August 18, the defendant filed an answer to the petition, and the Court of Appeal denied the petition on the same day.

On September 7, 1988, the People filed a petition for review in the California Supreme Court. The petition was denied on October 13, 1988, with Kaufman, J., expressing his opinion the petition should be granted.

On October 18, 1988, the People filed a motion in the California Court of Appeal to stay the issuance of the remittitur until this Court makes a final disposition of the People's petition for writ of certiorari. On November 3, 1988, the California Court of Appeal stayed the issuance of the remittitur for 30 days only.

C. HOW THE FEDERAL QUESTION WAS PRESENTED

California no longer has an independent state ground for the exclusion of evidence as a result of an allegedly unreasonable search or seizure. The addition on June 8, 1982, of Article I, section 28(d) to the California Constitution permits California courts to exclude evidence on search and seizure grounds only if the search or seizure violated the Fourth Amendment of the United States Constitution (see *In re Lance W.* (1985) 37 Cal.3d 873).

Accordingly, in the instant case the California Court of Appeal stated, "The issue here must be decided under federal law" (slip opinion, p. A-3, line 1). It concluded there was a "violation of the defendant's Fourth Amendment rights" (slip opinion, p. A-5, lines 32-33).

REASONS FOR GRANTING REVIEW

This case falls within the provisions of Rule 17.1(c), Rules of the Supreme Court of the United States: A state court has decided a federal question in a way in conflict with applicable decisions of this Court.

The California Court of Appeal decision in this case is in direct conflict with this Court's decision in *United States v. Hensley* (1985) 469 U.S. 221 [83 L.Ed.2d 604]. There, a police officer drew his pistol and ordered two armed-robbery suspects out of their vehicle during a "Terry stop." This Court held such safety precautions were permissible under the circumstances.

However, in the instant case the California Court of Appeal held a police officer may not draw his pistol and order a driver out of his car even though he has an undisputed right to detain the driver on a reasonable suspicion he had committed murder with deadly weapons.

The Court of Appeal decision in this case also conflicts with decisions of this Court which hold the Fourth Amendment does not protect a person's physical characteristics which are exposed to the public; e.g., *Katz v. United States* (1967) 389 U.S. 347 [19 L.Ed.2d 576]; *United States v. Dionisio* (1973) 410 U.S. 1 [35 L.Ed.2d 67]; *United States v. Knotts* (1983) 460 U.S. 276 [75 L.Ed.2d 55].

In this case the police had an undisputed right to detain the murder suspect and, during that detention in a public place, they observed injuries on his hands which gave them probable cause to arrest him. Nevertheless, the Court of Appeal suppressed the observation as unlawful, held the suspect was unlawfully arrested, and remanded the matter to the trial court for suppression of vital evidentiary products of the arrest.

The decision of the California Court of Appeal inflicts severe and probably fatal damage to this murder prosecution. The decision directly suppresses evidence of the defendant's hand injuries which are circumstantial evidence of his beating and slashing the victim. However, its finding that the defendant's arrest was unlawful is even more significant.

The defendant's arrest directly produced an incriminating admission during his interrogation and physical evidence linking him to the crime. Although the Court of Appeal's decision remands the matter to the trial court to determine whether the link between the arrest and the aforesaid evidence is attenuated, the result of a further hearing is quite predictable. There is no evidence of attenuation. Accordingly, the finding of an unlawful arrest effectively requires the trial court to suppress all the evidence obtained from the defendant at the police station. That evidence is essential to this prosecution.

This is the most appropriate time for review by this Court. The People have exhausted their remedies in the state courts on the issues of the legality of the arrest and the observation of the defendant's injured hands. Further proceedings in the state courts cannot undo the damage done by the Court of Appeal decision. Moreover, the decision is patently inconsistent with this Court's binding precedents. Accordingly, this is an appropriate case for summary reversal (see *Pennsylvania v. Bruder,* No. 88-161, decided October 31, 1988).

Finally, this case presents this Court with an opportunity to make it unmistakably clear to all other courts that the principle articulated in *Katz v. United States, supra, United States v. Dionisio, supra,* and *United States v. Knotts, supra,* applies with full force in the circumstances of a detention. That is, the Fourth Amendment does not protect those personal characteristics which a person exposes to public view. Although this principle has been applied to detentions by some courts (see cases collected in 3 W. LaFave, § 9.2, p. 376, n. 115), the result in the instant case makes it apparent that not all courts recognize the principle applies to observations made during a detention. For that reason, too, the petition for writ of certiorari should be granted.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO DRAW HIS WEAPON AND ORDER A MOTORIST SUSPECTED OF MURDER TO GET OUT OF HIS CAR. THE FOURTH AMENDMENT DOES NOT REQUIRE NOR PERMIT SUPPRESSION OF THE OFFICER'S OBSERVATION OF THE SUSPECT'S EXTERNAL PHYSICAL CHARACTERISTICS DURING THE ENSUING DETENTION, EVEN IF THE OBSERVATION WAS MADE WHILE THE OFFICER WAS IMPERMISSIBLY HANDCUFFING THE SUSPECT.

The California Court of Appeal recognized Sgt. Manis and Detective Wiggins had a right to detain and question Mark Radke as a suspect in the murder of Jeffrey Rudiger. From that promising beginning, however, the Court proceeded to condemn every step taken by the police during the detention, and ultimately concluded they unlawfully arrested him and unlawfully observed what was in plain sight.

Except for its initial recognition of the right to detain, every one of the Court of Appeal's conclusions in this case is in conflict with applicable decisions of this Court. Petitioner will briefly examine each in sequence.

The detention began when the detectives approached Radke's car, which was stopped in a traffic lane for a red light, and ordered him out of his car. The Court of Appeal stated the police were not authorized to order him to emerge from his car.

In *Pennsylvania v. Mimms* (1977) 434 U.S. 106 [54 L.Ed.2d 331] this Court held the Fourth Amendment permits an officer, upon stopping a motorist for a traffic violation, to order the motorist to emerge. Because a

seated motorist and passing traffic both pose substantial hazards to the officer, the interest in the officer's safety outweighs the minimal intrusion on the motorist's liberty involved in the order to get out of the car. The Court of Appeal did not discuss nor even cite this decision.

The Court of Appeal also stated the officers were not authorized to order Radke out of the car at gunpoint. This assertion not only contains an unsupported implication that a gun was pointed at Radke, it misstates the law.

In *United States v. Hensley* (1985) 469 U.S. 221 [83 L.Ed.2d 604] Kentucky officers made a "Terry stop" of two men in a car based upon information in a wanted flyer that the driver was wanted for investigation of armed robbery. One officer approached the car with his revolver drawn and ordered the men to exit the car. A second officer looked into the car and observed a partially concealed pistol. This Court approved the conduct of both officers:

> "When the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. The Covington officers' conduct was well within the permissible range in the context of suspects who are reported to be armed and dangerous. See Michigan v. Long, 463 US 1032, 1049-1050, 77 L Ed 2d 1201, 103 S Ct 3469 (1983); Pennsylvania v. Mimms, 434 US 106, 101-111, 54 L Ed 2d 331, 98 SCt 330 (1977) (per curiam)." (*United States v. Hensley, supra,* 469 U.S. at p. 235.)

The Court of Appeal did not discuss or even cite this decision. Instead, it presented the police with a Hobson's choice: Draw your weapon and risk a judicial decision

that the act transforms a lawful detention into an unlawful de facto arrest, or keep your weapon in its holster and risk being shot (see *United States v. Jackson* (2d Cir. 1981) 652 F.2d 244, 249-250). The Court of Appeal's decision is irreconcilable with this Court's view of reasonable police precautions in a detention.

The Court of Appeal next appears to criticize the officers for not questioning the suspect immediately after ordering him out of the car. This criticism conflicts with decisions of this Court which permit the police to take protective measures *before* questioning the suspect.

In *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2d 889] this Court approved the officer's frisk of the suspects after he had only asked for their names. In his concurring opinion Justice Harlan emphasized the right of the officer, under appropriate circumstances, to take protective measures before asking questions.

> "Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." (*Terry v. Ohio, supra*, 392 U.S. at p. 33.)

Justice Harlan's view was followed in *Adams v. Williams* (1972) 407 U.S. 143 [32 L.Ed.2d 612] where the Court approved the officer's removal of a pistol from the suspect's waistband before asking him any questions.

Similar police conduct was approved in *Michigan v. Long* (1983) 463 U.S. 1032 [77 L.Ed.2d 1201].

In *United States v. Sharpe* (1985) 470 U.S. 675 [84 L.Ed.2d 605] Officer Thrasher drew his revolver, ordered the suspect Savage out of his truck, and immediately patted him down for weapons without asking any questions. The reasonableness of such precautions is now so generally recognized that it was not even questioned by the lower appellate court (see 470 U.S. at p. 683), and only the length of the detention was at issue.

Finally, the Court of Appeal condemned the handcuffing of the suspect. It opined the "[u]se of the gun and handcuffs turned what should have been a legal detention into an illegal arrest" (slip opinion, p. A-3, lines 30-32). It held the police viewing of the injuries on the suspect's hands must be suppressed, apparently because the viewing coincided in time with the handcuffing.

Petitioner is not aware of any decisions of this Court which specifically discuss or decide whether the use of handcuffs may be justified during a detention. However, other courts have approved such conduct in certain circumstances (see 3 W. LaFave, Search and Seizure, § 9.2, p. 367).

This Court has stated that "common sense and ordinary human experience must govern over rigid criteria" in distinguishing a lawful detention from an unlawful de facto arrest. (*United States v. Sharpe, supra,* 470 U.S. at p. 685). There is no "litmus-paper test" for such a determination. (*Florida v. Royer* (1983) 460 U.S. 491, 506 [75 L.Ed.2d 229].)

Common sense justifies the use of handcuffs in this case. The detectives could not conduct an interview in the traffic lane because of the obvious hazard of passing cars.

Accordingly, the suspect's car, the detectives' car, the suspect, and the two detectives all had to be moved out of harm's way. The officers selected a method for the movement which was most consistent with officer safety. By handcuffing and placing the suspect in the detectives' car, the officers prevented him from fleeing or obtaining a weapon from his own car.

Although an arguably less intrusive means of accomplishing the movement out of the traffic lane may be conceived in hindsight, that possibility does not make the police conduct unreasonable (see *United States v. Sharpe, supra,* 470 U.S. at pp. 686-687), nor convert the detention into an arrest.

Here, the police told the suspect he was *not* under arrest, and that the handcuffs were being used because he was being put in a car which lacked a protective barrier, a so-called "cage." Moreover, he was handcuffed in front for his comfort, rather than with his hands behind his back as is standard practice with arrested persons. Accordingly, petitioner submits the use of handcuffs did not transform the detention into an arrest.

In any event, this Court need not determine the propriety of handcuffing in this case. The central issue is not handcuffing. The issue is the propriety of the police observation of the suspect's injured hands. That observation, combined with antecedent information, clearly gave the police probable cause to arrest Radke.

The Court of Appeal ordered suppression of the police observation of the suspect's hands because of an alleged Fourth Amendment violation. That order is in direct conflict with this Court's holding in *United States v. Dionisio* (1973) 410 U.S. 1, 14 [35 L.Ed.2d 67]:

> "In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his own home or office . . . ." 389 US, at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world."

Sgt. Manis had an unquestionable right to observe Radke where he did, on a public street. Radke's external physical characteristics, including his injured hands, were in plain sight and exposed to public view. Thus, the observation of his hands cannot be said to have been the product of either a search or a seizure within the scope of the Fourth Amendment. Instead, the observation was a product of Radke's decision to place himself within public view. Accordingly, the observation was legitimately obtained and it justified the ensuing arrest.

By granting a writ of certiorari in this case this Court can establish a bright-line rule that the Fourth Amendment permits police to examine the external physical characteristics of a suspect during a detention.

The Court of Appeal's decision is also in direct conflict with this Court's decision in *United States v. Payner* (1980) 447 U.S. 727 [65 L.Ed.2d 468]. That case reiterated the rule that search and seizure issues are generally determined by a two-step process. The first question is whether the case involves a protected privacy interest of the defendant. If it does, then and only then, a second

question is asked: was a police intrusion on that interest reasonable or warranted?

In the instant case, the suspect had no privacy interest in the appearance of his hands in a public place. The specific conduct of the police which produced the evidence was merely looking at the suspect's hands in a public place. Such conduct is not an intrusion within the scope of the Fourth Amendment. Accordingly, the reasonableness of other conduct by the police (e.g., handcuffing) is irrelevant to the analysis and need not be determined.

The Court of Appeal wrongly assumed a mere temporal coincidence between the handcuffing and the observation of the hands was significant of a cause-and-effect relationship for purposes of Fourth Amendment analysis. In other words, the Court impliedly reasoned the observation must be suppressed because it would not have been made but for the illegal handcuffing.

The so-called "but for" test was rejected by this Court in *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 [9 L.Ed.2d 441]:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

The hand-injury evidence in this case came to light by means of looking at the suspect, not by handcuffing him. The temporal coincidence of those police actions was pure

happenstance, a more fortuity. The handcuffing was not the sine qua non or indispensable cause of the discovery of the hand injuries, but was at most a contributing cause (see "Maguire, How to Unpoison the Fruit — The Fourth Amendment and the Exclusionary Rule, 55 J.Crim.L.C. and P.S. 307 (1964)). Accordingly, the observation should not have been suppressed.

CONCLUSION

The decisions of this Court establish the officers acted reasonably in detaining the suspect in this case. Moreover, this Court's decisions hold the Fourth Amendment does not protect a person's physical characteristics which are exposed to public view.

Nevertheless, the California Court of Appeal has ignored those decisions and held to the contrary. The effect of the Court of Appeal's decision is to nullify this Court's authority and to render its decisions of no force and effect in this appellate district.

Accordingly, petitioner requests this Court to summarily reverse the California Court of Appeal, to vacate the finding that Mr. Radke was unlawfully arrested, to vacate the order suppressing the police viewing of his hands, and

to vacate the order remanding the case to the Superior Court for a further hearing on the question of attenuation.

Dated: November 30, 1988

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

Opinion and Judgment of the California Court of Appeal, Fourth Appellate District, Division One, July 29, 1988

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D008276
(Super. Ct. No. CR94248)

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT, ETC.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed July 29, 1988 in the Court of Appeal, Fourth District.

PROCEEDINGS in mandate after denial of a Penal Code section 1538.5 motion, Perry J. Langford, Judge. Writ granted.

On January 21, 1988, Jeffrey Rudiger, age 16, took a work break and visited with his friend Justin who worked at a nearby Chuck E. Cheeze. Rudiger told Justin he was going to meet Mark Radke after work to help him with a project. Rudiger left work between 8:00 and 8:30 p.m. telling a co-worker he had a project to do with someone at Chuck E. Cheeze. Radke works at Chuck E. Cheeze.

Early in the morning of January 22, 1988, Rudiger was reported missing. His lifeless body was found about 9:00 a.m. that day with stab wounds and trauma. There was a

great deal of blood at the scene with tire tracks through the puddles of blood near the body.

The detectives learned that Justin thought Rudiger was meeting Radke after work. They went to Chuck E. Cheeze the evening of the 22nd and found Radke's car in the parking lot. An inspection of its tires showed a tire tread pattern the same as the one in the pools of blood where Rudiger was found. The detectives retired to plan their strategy and failed to notice when Radke got in the car and drove away. They later located Radke's car parked at a friend's and followed it at approximately 10:00 p.m. when Radke left the premises. When Radke stopped for a red light, two detectives in civilian clothes stopped behind, got out of their unmarked car and approached Radke. One officer had his gun drawn. Radke was ordered out of the car. He got out and while walking with the officer back to the police car Radke asked if he was under arrest. The officer said no but they wanted to talk to him about Rudiger's death. The officer explained that because this was an unmarked car without a cage he would have to handcuff him. However, if Radke promised not to do anything stupid the officer said he would handcuff his hands in front rather than in back. While handcuffing Radke the officer noted the knuckles on both of Radke's hands were swollen. He had several scratches on one hand and a laceration in the palm of his hand. Radke's car was impounded.

At headquarters he was Mirandized (see *Miranda v. Arizona* (1966) 384 U.S. 436, 467-473) and questioned for an hour. During that time he gave written consent to a search of his car. The officers took his jacket on which there appeared to be blood stains. When one officer accused Radke of the crime, he asked for a lawyer. The questioning stopped and Radke was taken home.

The issue here must be decided under federal law. Federal standards provide the police may make an investigatory stop when there is a reasonable suspicion based on specific and articulable facts of criminal activity. Thus, in circumstances where there is less than probable cause to arrest the police may stop and briefly detain a person for questioning or other limited investigation. (*Terry v. Ohio* (1967) 392 U.S. 1, 43.) If during a detention facts are developed which ripen into probable cause that the person committed a crime the officers have the authority to arrest the person and to take him to the station for further interrogation. (*Hayes v. Florida* (1985) 470 U.S. 811, 816; *Dunaway v. New York* (1979) 442 U.S. 200, 213-216). Here the officers knew the victim said he was meeting Radke after work and tire tracks left in pools of blood near the body appeared to be the same as the tire tread patterns of the tires on Radke's car. This created a reasonable suspicion for the officers to detain him briefly and question him at the scene. However, a reasonable suspicion to investigate does not authorize the police to approach a car at gun point and order the occupant to emerge. No reasonable person in defendant's situation would believe he could ignore the gun and request to exit the vehicle and continue driving. Nor does a reasonable suspicion authorize the officers to handcuff the defendant. After ordering Radke from the car the officers did not question him in an attempt to develop probable cause. Radke did nothing that would add to the officers' suspicion and elevate it to probable cause. (See *People v. Brown* (1985) 169 Cal.App.3d 159, 166-167.) Use of the gun and handcuffs turned what should have been a legal detention into an illegal arrest in violation of the defendant's Fourth Amendment rights. The viewing of defendant's hands occurred while the officers were, without probable cause, handcuffing Radke. Although both parties

concede this evidence along with that giving rise to the initial suspicion when taken together provide probable cause for arrest, the viewing of the hands must be suppressed as a product of the illegal seizure. Thus, there was no probable cause for arrest. The Penal Code section 1538.5 motion should have been granted unless the written consent to search the car and to produce the contents of his pockets are sufficiently attenuated to escape the illegal taint. (*Wong Sun v. United States* (1962) 371 U.S. 471, 491.) This issue was presented, but not resolved by the trial court. The case must be remanded to Superior Court for hearing and ruling on the question of attenuation.

An alternative writ or order to show cause would add nothing to the presentation. A peremptory writ is proper. (Code Civ. Proc., § 1088; *United Nuclear Corp. v. Superior Court* (1980) 113 Cal.App.3d 359; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

Let a peremptory writ issue directing the superior court to vacate its denial of the Penal Code section 1538.5 motion and to calendar a hearing at its earliest convenience on the question of attenuation.

/s/ Work, J.
Work, J.

I CONCUR:

/s/ Wiener
Wiener, Acting P. J.

I respectfully dissent. The only question, I believe, is the propriety of the handcuffing. Here the police had no standard "caged" back seat and it is reasonable for the officers, in the interest of their own safety, to handcuff the defendant in the open vehicle. I would deny the petition.

/s/ Todd

TODD, J.

APPENDIX B

Order of the Superior Court, in and for San Diego County, May 31, 1988

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Case No. CR 94248
DA B32907

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

MARK ALAN RADKE,
Defendant.

Hearing Date: May 31, 1988 1:30 p.m. Cal. No. 2 Department 15.

Filed May 31, 1988, Robert D. Zumwalt, Clerk, By S. Kirchman, Deputy.

ORDER OF COURT

This matter came on regularly for hearing on May 31, 1988.

Appearances and proceedings were as set forth in the minutes of that date.

IT IS ORDERED:

The PC 995 motion is denied. It is derivative of the PC 1538.5 motion.

The PC 1538.5 motion is denied.

Defense counsel's declaration is inadequate to establish good cause for the taking of addtional defense evidence.

The defense concedes, as it must, that the information from Valdivia, plus the tire tracks justified a temporary

detention of the defendant. (P's & A's 9) The record before the court does not suggest that the subsequent discovery could change this conclusion. The addition of the hand injuries provided probable cause for an arrest, whether it was actually made or not. It also provided probable cause to search defendant's car under the automobile exception to the warrant requirement. The real issue, then, is whether the officers violated the Fourth Amendment when they saw his hands. They were dealing with a possible murder suspect, so concern for their safety was reasonable. The court concludes the handcuffing, done as it was done, did not violate the Fourth Amendment. Secret intentions of the police do not violate the Fourth Amendment.

The motion for discovery is granted. The People are ordered to treat defendant's motion as a request for discovery and to provide the defense with all the discovery required by law. They need not provide anything not required by law. If the People have in their possession materials which are within the scope of the defense requests, but which the People do not believe are discoverable, they shall advise the defense of the existence of such materials with sufficient particularity as to permit the presentation of a motion. In the event the parties, after conferring, have actual disputes as to the discoverability of particular existing materials, the court will resolve justiciable controversies, upon the presentation of moving papers explicitly setting them out.

Dated: May 31, 1988.

/s/ J. Perry Langford

J. PERRY LANGFORD
Judge of the Superior Court

APPENDIX C

Order of the California Court of Appeal, Fourth Appellate District, Division One, August 18, 1988

APPENDIX C

COURT OF APPEAL
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

D008276
(SUPER. CT. NO. CR94248)

MARK ALAN RADKE,
Petitioner,

v.

SUPERIOR COURT, etc.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed August 18, 1988, Court of Appeal Fourth District.

THE COURT:

Real party's petition for rehearing is denied.

/s/ Wiener
WIENER, Acting P.J.

Copies to: All Parties

APPENDIX D

Order of the California Supreme Court, October 13, 1988

APPENDIX D

Order Denying Review
After Judgment by the Court of Appeal

4th District, Division 1, No. D008276
S007128

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT OF THE COUNTY OF SAN DIEGO,
Respondent;

PEOPLE,
Real Party in Interest.

Filed October 13, 1988 in the Supreme Court, ... Clerk.

Petition for review of Real Party in Interest DENIED.

Kaufman, J., is of the opinion the petition should be granted.

LUCAS,
Chief Justice

APPENDIX E

**Order of the California Court of Appeal,
Fourth Appellate District,
Division One,
November 3, 1988**

APPENDIX E

COURT OF APPEAL — STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION ONE

D008276
SUPER. CT. NO. CR94248

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT, etc.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed November 3, 1988 in the Court of Appeal, Fourth District, Stephen M. Kelly, Clerk.

THE COURT:

Real Party in Interest's Motion to Stay Remittitur, filed October 18, 1988, is GRANTED. The issuance of the remittitur is stayed for 30 days from the date of this order.

Wiener
Acting Presiding Justice

cc: All Parties